No. 98-5864

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

TOMMY DAVID STRICKLER,
Petitioner,
v.
FRED W. GREENE, Warden,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

There is no dispute in this case, nor has there ever been, that Leanne Whitlock was brutally murdered in January 1990. There likewise is no doubt of the Commonwealth's compelling interest in bringing Ms. Whitlock's murderer to justice, or of the Commonwealth's interest in the finality of properly obtained and reliable capital judgments. The Commonwealth's emphatic repetition of those propositions adds nothing to the analysis of the questions that this Court directed the parties to brief. What *is* at issue here is whether the capital judgment against *petitioner* can, in fact, be treated as reliable, given the Commonwealth's suppression of evidence that would have devastated the credibility of the Commonwealth's purportedly disinterested "eyewitness," Anne Stoltzfus. The Commonwealth's argument before this Court on *that* issue rests, at bottom, on the proposition that "the law is easy to beat." *Deal v. United States*, 508 U.S. 129, 136 (1993). In the Commonwealth's view, if state prosecutors can misrepresent their compliance with federal constitutional obligations long enough to secure affirmance of a criminal conviction and denial of state collateral review, there is nothing federal courts can do about it.

Indeed, even in this Court, the Commonwealth's defense of its actions evinces a surprisingly lackadaisical approach not only to its constitutional obligations under *Brady*, but also to the most fundamental duties that every litigant owes to the judicial system. Without a hint of embarrassment, the Commonwealth asserts that its factual representations to the state courts, avowing its compliance with *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, "obviously" should *not* be taken to imply that the Commonwealth agents who made those representations actually "had reviewed the Commonwealth's files for possible exculpatory material." Va. Br. 28. Such representations, it seems, are no more than stock assertions that the Commonwealth makes, without inquiry into their accuracy, to ensure the rejection of federal constitutional claims. That

approach to the judicial system, which would be unsettling if suggested by a mere private litigant, scarcely "justif[ies this Court's] trust in the prosecutor as the representative of a sovereignty whose interest * * * is not that it shall win a case, but that justice shall be done." *Kyles v. Whitley*, 514 U.S. 419, 439 (1995) (internal citations omitted). It is not surprising that neither the United States nor a single State of the Union supports the Commonwealth's arguments in this Court.

In any event, the Commonwealth's attempt to fortify and defend the Fourth Circuit's decision severely misapprehends not only this Court's *Brady* jurisprudence, but also this Court's understanding of the type of "external" impediments to the defense that traditionally have been held to constitute "cause."[1] The Commonwealth would assess the materiality of new evidence that impeaches a particular witness by conclusively presuming that the testimony of all remaining witnesses is the gospel truth, even if (as in the case of Donna Tudor) those other witnesses were themselves subject to devastating impeachment; indeed, the Commonwealth would not even consider evidence "exculpatory" unless the prosecution can articulate *no* theory, however farfetched, under which the evidence might still be consistent with its case. And under the Commonwealth's "heads I win, tails you lose" analysis of procedural default, a prisoner can never show "cause" for failing to raise his *Brady* claim in the state courts: If the prisoner ultimately found the suppressed evidence, that fact alone establishes that he was insufficiently "diligent" in failing to discover his claim sooner. Because the Commonwealth's arguments are wholly unsupportable under this Court's cases, the judgment of the court of appeals must be reversed.

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[1] The Commonwealth does not appear to dispute that, if petitioner's *Brady* claim has merit, he need make no further showing to establish the "prejudice" component of the procedural default inquiry. *See* Va. Br. 32-33 (arguing that petitioner failed to establish the "prejudice" required to excuse his procedural default solely on the basis that petitioner's *Brady* claim lacks merit); *see also* Pet. Br. 46-47.

I. THE COMMONWEALTH CLEARLY VIOLATED *BRADY* AND ITS PROGENY

The Commonwealth's *Brady* argument is premised on the theory that petitioner had access to the "substance" (Va. Br. 36) of the five concededly withheld documents, because the Commonwealth allegedly disclosed to him three other documents—Exhibits 2, 7 and 8. The Commonwealth in fact never has established that Exhibits 2, 7 and 8 were disclosed to petitioner. Indeed, although the Commonwealth misleadingly contends that *petitioner* "himself established" that those exhibits "were in the Commonwealth's Attorney's file prior to trial" (*id.* at 37), the Commonwealth cites to the *prosecutor's* affidavit for that claim. *Ibid.* (citing J.A. 368). Petitioner submitted a contrary affidavit by one his trial counsel, who swore that he "first learned these materials existed * * * in 1997" (J.A. 300), seven years after the trial. Petitioner also submitted an affidavit to the same effect by Henderson's trial counsel, who had ostensibly been given access to the same prosecutor's "open file." *Id.* at 330.[2] The district court expressly adverted to that factual dispute, but it ruled that it was not necessary to resolve it, because petitioner is clearly entitled to relief under *Brady* "even if the three documents that are in dispute were provided to [petitioner's] trial counsel." *Id.* at 392.[3]

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[2] While the affidavit of petitioner's trial counsel refers to "the attached Exhibits 1-7" (J.A. 300), the context makes clear that the omission of Exhibit 8 from that range was a typographical error. The affidavit makes clear that trial counsel was referring to the totality of "Det. Claytor's notes of interviews * * * and letters and notes from Ann Stoltzfus to Det. Claytor." *Ibid.* The district court clearly understood that point. *See id.* at 392 (noting that "Exhibits, 2, 7 and 8" "appear to be genuinely in dispute").

[3] In light of the clarity of the district court's analysis of this issue, it is difficult to understand how the Commonwealth can reasonably represent to this Court that "[t]he district court did not mention exhibits 2, 7 or 8," but "did not take issue" with the Commonwealth's claim "that the defense had access to each of those documents prior to trial." Va. Br. 13. The district court plainly *did* mention those exhibits, making clear the limited pur-

Because the district court merely assumed *arguendo* that those three exhibits were disclosed to the defense, the Commonwealth errs in suggesting that those exhibits require affirmance of the Fourth Circuit's judgment, which ordered the outright *dismissal* of the habeas petition. J.A. 429. If this Court were inclined to agree with the Commonwealth's claim that Exhibits 2, 7 and 8 replicate the five concededly withheld documents, that conclusion would still require vacatur and an evidentiary hearing into whether the Commonwealth in fact produced those three exhibits in its "open file."[4] This Court should not, however, agree with the Commonwealth's strained interpretation of the five withheld documents. Because the district court correctly concluded petitioner is entitled to relief under *Brady* even on the assumption that the defense had access to Exhibits 2, 7 and 8 before the trial, there is no need for any further hearing. The judgment of the court of appeals rejecting petitioner's *Brady* claim should be reversed outright.

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pose for which it accepted the premise that the defense might have had access to them before trial. J.A. 391-92.

[4] The Commonwealth also notes that one of petitioner's trial counsel, Thomas Roberts, submitted to the district court an affidavit, which that court "accepted * * * 'as true' for purposes of * * * summary judgment." Va. Br. 36 & n.16. Roberts' brief affidavit does not, as the Commonwealth asserts, "conclusively establish[] that [petitioner] was aware at the time of trial of the facts contained in the 'Stoltzfus materials.'" *Ibid.* Indeed, the affidavit asserts that Roberts does *not* recall seeing the specific documents at issue here, but merely recalls "the information contained in them." J.A. 371. The affidavit does not identify any specific "information" contained in the Stoltzfus materials that Mr. Roberts purports to recall; it simply recites Mr. Roberts' impression that Stoltzfus' story had become more detailed over time. Not surprisingly, the district court concluded that "[e]ven accepting Roberts' statements as accurate and truthful, they are much too vague and insufficient to create a genuine dispute that Exhibits 1, 3, 4, 5, and 6 of the Stoltzfus materials were disclosed to defense counsel in light of all of the evidence to the contrary." *Id.* at 399-400. The Commonwealth has offered no argument that impugns that analysis.

A. The Five Suppressed Exhibits Were Clearly Exculpatory

The Commonwealth contends that the letters and notes on which petitioner bases his *Brady* claim are not "exculpatory" because they purportedly contain "no per se 'inconsistencies'" (Va. Br. 41 n.22), but merely reflect "minor variations" (*ibid.*) that could easily have a benign explanation. *Id.* at 42. According to the Commonwealth, it is "completely unremarkable that a citizen witness such as Stoltzfus initially expressed some hesitancy," and it would be "neither reasonable nor realistic" to expect her "to say exactly the same thing on each occasion" she discussed the case with the police. *Ibid.* Those arguments evince a profound misunderstanding not only of what types of evidence are deemed "exculpatory" under *Brady* and its progeny, but also of the record in this case.

1. Evidence is "exculpatory" if it is "*favorable* to the accused" (*Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987) (emphasis added)), a determination that turns on what "competent counsel" could have accomplished with the evidence. *Kyles*, 514 U.S. at 441; *see also United States v. Bagley*, 473 U.S. 667, 676 (1985) (*Brady* inquiry focuses on impact evidence would have "if disclosed and used effectively"). This Court made clear 40 years ago that evidence that impeaches a prosecution witness clearly is "favorable" in the relevant sense, since "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Napue v. Illinois*, 360 U.S. 264, 269 (1959). For that reason, it has long been established that "[i]mpeachment evidence * * * falls within the *Brady* rule." *Bagley*, 473 U.S. at 676; *Giglio v. United States*, 405 U.S. 150, 154 (1972).[5]

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[5] Because the principles on which petitioner relies were established decades before his trial, there is no substance to the Commonwealth's assertion that petitioner seeks to "expand the scope

According to the Commonwealth, however, impeachment evidence should not be deemed "exculpatory" so long as the prosecution can articulate *some* theory under which the evidence is consistent with the prosecution's case, such as the Commonwealth's suggestion that most civilian witnesses initially give truncated accounts of the facts to the authorities. Va. Br. 42-43. No precedent from this Court supports such a view of *Brady*, and the Commonwealth understandably cites none. Although in the first instance "it is the State that decides which information must be disclosed" (*Ritchie*, 480 U.S. at 59), this Court's *Brady* cases seek "to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations." *Kyles*, 514 U.S. at 440. The threshold issue for the prosecutor, therefore, is not whether *he* can put an inculpatory cast on the evidence, but whether competent defense counsel could reasonably use the evidence to suggest to the jury that it should infer bias, confabulation, lack of memory, or any other circumstance that the law of evidence traditionally has regarded as a proper ground for impugning the reliability of testimonial evidence. *Cf. Kyles*, 514 U.S. at 444 (noting that "the evolution over time of a given eyewitness's description can be fatal to its reliability").

The Commonwealth's protestations about what reasonably may be expected from a "citizen witness such as Stoltzfus" (Va. Br. 42) ring particularly hollow in this case, because Stoltzfus chose to deflect all attempts to cast doubt on her story by appealing to her "exceptionally good memory" and by emphasizing how closely she "paid attention" to the events she related at trial. J.A. 58. It was that "exceptionally good memory" that purportedly explained Stoltzfus' remarkable ability to give testimony bordering on videography, including a detailed account of the garments worn by petitioner several months earlier. Having secured petitioner's conviction by relying on Stoltz-

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of *Brady*" in violation of the "new rule" principle of *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny. Va. Br. 42 & n.23.

fus, "exceptional" memory, the Commonwealth is poorly positioned to suggest now that she and her memory were, after all, merely ordinary.

2. Moreover, the Commonwealth's claim that the five concededly suppressed exhibits lacked any exculpatory value beyond that provided by Exhibits 2, 7 and 8 is sheer obfuscation. For example, the Commonwealth contends that there is nothing exculpatory in the fact that Stoltzfus claimed, when she first was approached by Det. Claytor, that she could not identify the black female victim. J.A. 306 (Exh. 1). It reasons that "Whitlock's identity was never an issue at trial * * * and any attempt to 'impeach' Stoltzfus by suggesting that the black woman in the blue car was not Whitlock would have been ludicrous." Va. Br. 38-39 n.19. The Commonwealth also contends that, in any event, Exhibit 7 "establishes the very same thing"—*i.e.*, "that Stoltzfus identified Whitlock days after the crime" after viewing photographs of Ms. Whitlock with the victim's boyfriend. *Id.* at 38.

As the Commonwealth should well know, however, the issue is not whether the jury knew the actual identity of the victim, but whether it knew enough about Stoltzfus' lack of reliability as a percipient witness. A purported "eyewitness" who announces to the police when she is first interviewed (a time when the events presumably are freshest in her mind) that she lacks *any* ability to identify the victim—beyond stating the victim's race and sex—essentially admits that her powers of observation either are limited or were less than fully engaged on the occasion in question (or both). Each of those propositions is incompatible with Stoltzfus' trial claims that her memory is "exceptional" and that she paid close attention to the events she related to the jury, to say nothing of the inconsistency between Stoltzfus' original inability to describe the "black female" and her detailed account of the victim's appearance at trial. J.A. 41-42 ("rich college kid," "beautiful," "well dressed," "did not wear glasses," "she was happy, she was singing"). And contrary to the Commonwealth's assertion, that impeaching information is *not* "the

very same thing" that appears in Exhibit 7, in which Stoltzfus merely reports that she has now placed a name—"LeAnn Whitlock"—on "the black girl" whose abduction Stoltzfus had observed. *See* J.A. 319 ("As soon as I saw John Dean's pictures of LeAnn Whitlock[,] I knew beyond a shadow of a doubt that she was 'the black girl' * * *."); *see also* J.A. 311 (same report in Exh. 2). The latter statement would not "clearly put [defense counsel] on notice" that Stoltzfus' reliability "was open to serious attack." *Kyles*, 514 U.S. at 444 n.14.

That refusal to grapple with the crucial issue—whether Stoltzfus was in fact a reliable witness—is evident in the Commonwealth's entire approach to the purported overlap between the concededly suppressed documents and (the arguably produced) Exhibits 2, 7 and 8. That approach consists of identifying a discrete fact that appears in each set of documents (often in very different formulations), pronouncing the two sets of documents identical on that basis alone, and refusing to discuss the remaining (highly exculpatory) bulk of the withheld documents. Thus, for example, the fact that Exhibits 2 and 8 describe the victim's car as "shiny" and "blue" is sufficient for the Commonwealth to attach no importance to the fact that the suppressed exhibits show how Stoltzfus flip-flopped in her description of that car (from "sports" to "standard boxy American style"), or to the fact that she was merely relaying her "*vague impression*[*s*]" of what she *thought* the car looked like. *Compare* Va. Br. 39 *with* J.A. 311 (Exh. 3); *id.* at 317-18 (Exh. 5).

Similarly, the fact that Exhibit 4 sets a "time line of [Stoltzfus'] January 5[th] journey through the Valley Mall" (Va. Br. 39) is sufficient for the Commonwealth to pronounce that exhibit substantially identical to Exhibit 8 (*ibid.*), despite the wealth of devastating impeachment material that is found in the former but not in the latter. Among other things, Exhibit 4 makes clear that Stoltzfus had initially professed "confusion" about the events of January 5th, that she had not remembered

going inside the mall at all, and that she had thought she had been at the Mall much later, around closing time. J.A. 313, 316 (Exh. 4).[6] In Exhibit 4, Stoltzfus also admits that she has "a very vague memory that [she is] not sure of" (*id.* at 316) concerning the key aspect of her trial testimony: her description of how the blue car was boarded by a "wild guy." In fact, Stoltzfus expressed doubt that the "wild guy" was the same person as a "revved-up mountain man" she had seen earlier. *Ibid.* ("Were those 2 memories the same person?"). And Exhibit 4 also makes clear that many of the "memories" that Stoltzfus recounted at trial were not based on her independent recollection, but were based instead on what she inferred from old cash register receipts and a cancelled check and from her daughter's recollections. *Id.* at 313-14, 317. For that reason, the district court correctly concluded that Exhibit 4 "provides a basis [on] which Stoltzfus's testimony might have been excluded altogether." *Id.* at 389.[7]

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[6] The Commonwealth contends that Stoltzfus' initial "confusion" and lack of memory about being present at the Mall on January 5th are irrelevant, because Stoltzfus "confirmed her presence at the mall * * * at the time of Whitlock's abduction with several cash register receipts and a canceled check." Va. Br. 39-40. Again, that analysis misses the point, because what is important is not whether Stoltzfus ultimately resolved her "confusion" about being there in a manner that is consistent with other evidence, but that she was too addled to remember being there in the first place. The point is significant because the Commonwealth's case depended on the reliability of those aspects of Stoltzfus' testimony that were *not* independently corroborated—*i.e.*, her detailed account of the abduction and her identification of petitioner as the ring leader in that crime. It was therefore essential for the defense to expose Stoltzfus as an unreliable *witness*, even if it was true that other evidence corroborated some of the less important aspects of her testimony. *Cf. Idaho v. Wright*, 497 U.S. 805, 822-23 (1990).

[7] The Commonwealth asserts that the district court's view "is frivolous," and it represents that petitioner "never has challenged the admissibility of [Stoltzfus'] identification" of him. Va. Br. 40 n.20. Here, as elsewhere, the accuracy of the Commonwealth's analysis would benefit from forgoing invective in favor of a more searching review of the record on which its representations are

Finally, the Commonwealth's argument wholly ignores the fact that the five concededly suppressed exhibits cast the three exhibits that purportedly were disclosed in a dramatically different light. Taken together, the eight exhibits compellingly show not only "the evolution over time of [Stoltzfus'] description" (*Kyles*, 514 U.S. at 444), but also how that evolution mirrored, step by step, Det. Claytor's meetings with Stoltzfus; they show a witness who craved Claytor's approval and who appeared willing to shift her recollection to conform her story to what he expected it to be. *See, e.g.*, J.A. 316 ("I'm sorry my initial times were so far off"). Indeed, the eight documents paint a portrait of Stoltzfus that differs markedly from her trial image of a civilian who became, by happenstance, a reluctant participant in the criminal justice process. The jury saw a witness who initially avoided contacting the authorities and whose eventual trial testimony, like her contacts with law enforcement, reflected nothing beyond the discharge of an unpleasant civic duty. By contrast, the full sweep of the Stoltzfus materials reveals someone with a rather obsessive interest in the investigation—someone who, on her own initiative, bombarded law enforcement with her written impressions, and who clearly viewed herself as a member of the prosecution team. It accordingly cannot reasonably be doubted that the suppressed documents, besides contradicting numerous specific aspects of Stoltzfus' trial testimony, also furnished ample grounds for impeaching her for bias. *Cf. United States v. Abel*, 469 U.S. 45, 52 (1984) (noting that proof of bias is "almost always relevant" to a jury's assessment of "the accuracy and truth of a witness' testimony").

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based. Petitioner in fact moved to suppress Stoltzfus' identification testimony immediately after she finished giving it. J.A. 62. The prosecutor defeated that motion by suggesting that under "the totality of the circumstances" Stoltzfus "still had a good impression of the defendant" (*id.* at 63), an argument that presumably was meant to emphasize Stoltzfus' purportedly ample opportunity to observe petitioner at length during the commission of the offense. *Cf. United States v. Wade*, 388 U.S. 218, 241-42 (1967).

B. Stoltzfus' Pre-Trial Statements Were Plainly Material

This Court has emphasized time and again that the materiality standard "is not a sufficiency of evidence test," and, therefore, does not require that the defendant "demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Kyles*, 514 U.S. at 434-35. The Commonwealth's principal materiality argument nonetheless reduces to the assertion that the "independent" evidence suffices to convict petitioner, even if Stoltzfus' testimony is disregarded or heavily discounted. Va. Br. 46-49. The Commonwealth also places great emphasis on the fact that petitioner's counsel conceded in summation that petitioner "had abducted and robbed Whitlock," and that petitioner himself admitted, in connection with his capital sentencing proceeding, that he had been present in Whitlock's car and at the murder scene. Those "admissions," the Commonwealth believes, render "immaterial" its own failure to disclose exculpatory materials to the defense. *Id.* at 33-35. Once again, the Commonwealth's analysis is flawed at every turn.

1. The Commonwealth's reweighing of the non-Stoltzfus evidence not only is an impermissible "sufficiency" analysis of materiality, but it is also wrong on its own terms. As noted in the opening brief (Pet. Br. 33-34), without pertinent rebuttal from the Commonwealth, not all parts of a trial record are equally persuasive to a jury. Experience teaches that an in-court identification by an unwavering and purportedly disinterested eyewitness, like a videotape or a signed confession, is overwhelmingly likely to sway juries toward conviction. Because it is well-nigh impossible that any jury would assess the Commonwealth's evidentiary presentation *apart* from Stoltzfus' trial account, there is no evidence in this record that can fairly be said to be "independent" of that account.[8]

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[8] Indeed, the prosecutor told the jury that Stoltzfus' testimony "really [could] not be disputed beyond any doubt," and emphasized

Moreover, the Commonwealth's submission is deeply flawed because its claim that the evidence against petitioner is "overwhelming" improperly assumes that the trial testimony of all prosecution witnesses other than Stoltzfus was truthful and reliable.[9] The Commonwealth goes so far as to assert that Donna Tudor's assertions are "undisputed." Va. Br. 46; *see also id.* at 48-49. *Brady* claims, however, "must be evaluated in the context of the entire record" (*United States v. Agurs*, 427 U.S. 97, 112 (1976)), including those parts of the record that impeach the testimony of other prosecution witnesses. *Kyles*, 514 U.S. at 445. Donna Tudor's trial testimony was subject to withering impeachment, because she had originally been arrested for the theft of the victim's car and had also been found in possession of the victim's earrings; only then did she allege that petitioner had made incriminating statements in connection with the Whitlock killing. Not only was Tudor testifying to deflect suspicion for the murder away from herself and to curry favor with the prosecution, but she had earlier admitted to her husband that she had indeed been present at the time Ms. Whitlock was killed and that petitioner was innocent of the killing. *See* Pet. Br. 9-10 & n.6. Given that the opening brief emphasized Tudor's obvious lack of reliability (*id.* at 9-10, 34), the Commonwealth's decision

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that "[i]t was the last time Leanne was seen alive by anybody." J.A. 165, 170. He similarly relied on Stoltzfus' claims at sentencing to urge a death sentence on the basis of petitioner's role as "the aggressor. He was the one that ran out. He was the one that grabbed Leanne Whitlock. When she struggled trying to get away from him in Harrisonburg, he was the one that started beating her there in the car. And finally subdued her enough to make her drive away from the mall * * *." Sent. Tr. 15.

[9] Thus, for example, the Commonwealth notes that Kurt Massie saw petitioner "at 7:30 p.m. as he drove [the victim's] car into the field in which Whitlock was murdered." Va. Br. 46. The Commonwealth neglects to note that it was dark, that Massie saw only three people in the car, and that all the occupants of the car Massie observed were *white*. *Compare* Pet. Br. 8.

to premise its materiality analysis on the purportedly "undisputed" truth of her assertions is unfathomable.

Similarly inexplicable is the Commonwealth's apparent belief that the materiality issue before this Court should turn on the fact that the Virginia courts "found as a matter of historical fact" that petitioner killed Ms. Whitlock "in the commission of robbery *while armed with a deadly weapon*." Va. Br. 48 (citing former 28 U.S.C. 2254(d) (emphasis in original)). Even leaving aside the *legal* character of the materiality determination under *Brady*, no state court ever has held a hearing on petitioner's *Brady* claim and thus there are no "findings" entitled to deference under former Section 2254(d). *See Kimmelman v. Morrison*, 477 U.S. 365, 389 (1986) (no deference due when "[t]he issue * * * place[d] before the federal habeas courts is substantially different from the issue * * * presented to the [state] judge"); *see also Thompson v. Keohane*, 516 U.S. 99, 109-10 (1995) ("mixed questions" are beyond the purview of former Section 2254(d)). Moreover, the Sixth Amendment entitles petitioner to a trial *by jury*, not to an appellate determination of guilt. The jury that heard petitioner's case was told that it could convict him of capital murder on the basis of the "abduction" and "robbery" predicates, both of which were equally dependent on Stoltzfus' testimony. No jury that believed Stoltzfus had been coached to lie about petitioner's role in the abduction, and which rejected her account on that basis, would go on to find that petitioner nonetheless somehow robbed Whitlock, much less that he murdered her.

2. There is no greater merit to the Commonwealth's claim that its suppression of exculpatory evidence was rendered immaterial by "admissions" that petitioner's counsel made to the jury and that petitioner himself made at sentencing. "Of course," the statements petitioner made, after verdict, solely in connection with his impending sentencing, "could [not] possibly have affected the jury's appraisal * * * at the time of [his] trial[]."

Kyles, 514 U.S. at 450 n.19. But in any event, both sets of statements—whether by petitioner or his counsel—are properly viewed as part and parcel of the Commonwealth's violation of *Brady*, rather than as the means by which the Commonwealth can escape the consequences of that violation.

Because this Court borrowed the *Brady/Bagley* materiality standard from the "prejudice" prong of the Sixth Amendment's test for ineffective assistance of counsel, *see Kyles*, 514 U.S. at 434 (noting that Court "adopt[ed] formulation announced in *Strickland v. Washington*, 466 U.S. 668, 694 (1984)"), this Court's decision in *Hill v. Lockhart*, 474 U.S. 52 (1985), is particularly instructive. In *Hill*, the habeas petitioner sought to invalidate his plea of guilty on the ground that he had received ineffective assistance from his counsel in the proceedings leading to that plea. *Id.* at 54-55. Based on the argument advanced by the Commonwealth here, the answer to the claim in *Hill* would seem easy—*i.e.*, even if the attorney was incompetent, the defendant could not show "prejudice" because he himself "admitted" his guilt in open court by entering the plea. The Court, of course, did not follow that course. Speaking through then-Justice Rehnquist, the Court held instead that a habeas petitioner could secure relief if counsel's incompetence "affected the outcome of the plea process." *Id.* at 59. In particular, the Court interpreted *Strickland* to provide for relief if there is a reasonable probability that, absent counsel's deficient performance, the defendant "would not have pleaded guilty and would have insisted on going to trial." *Ibid.*[10]

[10] While amicus Criminal Justice Foundation urges this Court to decide this case on the basis of the standards that prevail in the *Strickland* context (CJF Br. 18-20), amicus inexplicably fails to cite, much less discuss, this Court's decision in *Hill*, which would seem to present the most apt analogy. The cases on which amicus relies—*Nix v. Whiteside*, 475 U.S. 157 (1986), and *Lockhart v. Fretwell*, 506 U.S. 364 (1993)—merely hold that a criminal defendant is not entitled to a trial advantage that violates the law. Unlike the defendants in *Nix* and *Fretwell*, petitioner does not seek "the luck of a lawless decisionmaker" (*Fretwell*, 506 U.S. at 370), but instead the judgment of an *informed* one.

That analysis is consistent with the general rule that the government may not reap the benefits of its own failure to observe constitutional commands (*e.g.*, *Wong Sun v. United States*, 371 U.S. 471 (1963) ("fruit of the poisonous tree" doctrine)), and it answers the Commonwealth's claim here. There can be no doubt that the Commonwealth's suppression of exculpatory evidence, and defense counsel's inability to impeach Stoltzfus' gripping account, produced counsel's tactical decision to concede petitioner's guilt on counts carrying a sentence other than death. Indeed, the Sixth Amendment *required* counsel to consider the wisdom of such a "tactical retreat" once it became clear that Stoltzfus' testimony was essentially unimpeachable. *United States v. Tabares*, 951 F.2d 405, 409 (1st Cir. 1991) (Breyer, J.) (noting that such concessions in the face of adversity "are deemed to be effective assistance"); *see also Underwood v. Clark*, 939 F.2d 473, 474 (7th Cir. 1991) (Posner, J.) (counsel may make such tactical concessions even if client has not consented to them). It is equally clear that, had the Commonwealth not suppressed the Stoltzfus materials, petitioner could well have been acquitted; and he certainly would not have corroborated with his own statements any part of Stoltzfus' discredited account. In these circumstances such "admissions" cannot render "immaterial" the Commonwealth's suppression of exculpatory evidence.

3. No different conclusion is warranted by the Commonwealth's assertion that the evidence is not "material" in light of the Commonwealth's purported right to introduce petitioner's "admissions" "at any retrial." Va. Br. 34. While the Commonwealth cites *Wood v. Bartholomew*, 516 U.S. 1 (1995), as the source of that purported right, the passage on which the Commonwealth relies is actually dictum, and weak dictum at that. The *holding* of the case was that the "suppressed" evidence was not mate-

rial even *without* considering new testimony "that the State likely could introduce on retrial." *Id.* at 8.[11] In any event, the Commonwealth is wrong to suppose that the materiality calculus would shift in its favor if the analysis were focused on a hypothetical retrial at which petitioner's "admissions" were part of the evidentiary mix.

To begin with, petitioner quite emphatically "denie[d] murdering, abducting, much less robbing Leanne Whitlock." Pre-Sentence Report 2C. He never "admitted" his *guilt* of the offenses, as the Commonwealth implies, but merely acknowledged in his sentencing proceedings that he rode in the blue car with Henderson and Ms. Whitlock, who appeared to know each other, and that he was nearby when Henderson killed her. *Id.* at 2B; Sent. Tr. 54-55.[12] While those statements would add to the Commonwealth's circumstantial case, they would also be subject to a compelling objection based on their lack of voluntariness. *Jackson v. Denno*, 378 U.S. 368 (1964). Even if the statements were admitted, petitioner would

[11] The Court gave no hint that its summary disposition in *Wood* was intended to change the traditional understanding that "[l]ogically the same [materiality] standard must apply" to the prosecutor's pre-trial assessment of whether disclosure is required and to the court's post-trial decision of whether failure to disclose particular information deprived the defendant of due process. *Agurs*, 427 U.S. at 108. Indeed, under the Commonwealth's view of the law, prosecutors would have untoward incentives to suppress exculpatory evidence in cases in which the materiality question is close, in the hope that additional evidence of guilt will have surfaced by the time, if ever, when the materiality issue is litigated. Far from discouraging prosecutors from "tacking too close to the wind," *Kyles*, 514 U.S. at 439, that approach would invite them to fly in the face of it.

[12] For that reason, amicus Criminal Justice Foundation is wrong to premise its entire analysis of this case on the theory that "we know" that petitioner "is guilty." CJF Br. 20. In fact, the bulk of amicus' submission is devoted to the proposition that the Court should "tighten[]" (CFJ Br. 14) the availability of habeas relief, a position not briefed by the real party in interest and thus "not properly before this Court." *Reno v. Koray*, 515 U.S. 50, 55-56 n.2 (1995).

have an absolute right to place before the jury all evidence relevant to their voluntariness, *Crane v. Kentucky*, 476 U.S. 683, 688-90 (1986), including the fact that he is a man of "borderline" intelligence—"four points above mental retardation," Sent. Tr. 42—who was facing death as a result of the Commonwealth's misconduct in suppressing evidence that could have exculpated him. A jury could certainly conclude that the "admissions" were not a product of free will, but a desperate ploy to avoid pointlessly antagonizing the sentencer, who was already persuaded that Stoltzfus' account was unimpeachable.

A new jury would also consider the Stoltzfus materials, which would allow petitioner not merely to expose Stoltzfus' earlier account as the result of coaching and confabulation, but also to "attack[] the reliability of the investigation" (*Kyles*, 514 U.S. at 446), including the testimony of other witnesses (*id.* at 445), on that basis. And, of course, the Commonwealth would not be the only party entitled to introduce new evidence. Petitioner could also rely on additional evidence that has more recently come to light. In particular, it now appears that Donna Tudor, in a 1994 letter to her husband, admitted committing perjury at petitioner's original trial.[13] It is impossible to escape the conclusion that the Commonwealth's suppression of exculpatory evidence must be deemed "material" under *any* analysis that this Court conceivably might apply.

II. PETITIONER CLEARLY ESTABLISHED "CAUSE" FOR FAILING TO PRESENT HIS *BRADY* CLAIM TO THE STATE COURTS

The Commonwealth chides petitioner for "devot[ing] an inordinate amount of his brief" to showing that the

[13] In her June 1994 letter to her husband, Donna Tudor stated: "You was right I lied in court on Strickler but I had to. I know he only tryed to save the girl." For the Court's convenience, three photographs of Donna Tudor's letter and copies of an expert report commissioned by the defense to assess the letter's authenticity have been lodged with the Clerk.

Commonwealth's misrepresentations about its "open file" policy precluded petitioner from raising his *Brady* claim at trial or on direct review. Va. Br. 17-18 n.6. According to the Commonwealth, the only relevant "default" for which petitioner must show "cause" is his failure to raise a *Brady* claim during state *habeas* review. *Id.* at 20 n.8. The Commonwealth believes that petitioner cannot make that showing because the Commonwealth's misrepresentations about compliance with *Brady* occurred "after" petitioner filed his initial habeas pleadings and, therefore, "could not have had any impact on petitioner's failure to raise a *Brady* claim in his petition as he was required to do under state law." *Id.* at 19, 28-32. Alternatively, the Commonwealth contends that petitioner was insufficiently diligent in failing to investigate the possibility of a *Brady* violation and in not seeking discovery in state habeas. Those assertions are utterly meritless.

1. The Commonwealth's attempt to carve up its misconduct into neat, separate compartments does not withstand even cursory scrutiny. Beginning with the trial, the Commonwealth engaged in a single, continuous course of misconduct by inviting petitioner's reliance on the purported discharge of the Commonwealth's constitutional duties through the woefully incomplete "open file." The representation conveyed by the "open file"—that the prosecution had properly discharged its *Brady* duties—was never withdrawn; to the contrary, it was renewed on appeal, and it was expressly reaffirmed in pleadings that the Commonwealth filed in response to petitioner's state habeas petition after petitioner sought state habeas relief. The Commonwealth's argument that the last representation of the series could not, by itself, have caused petitioner's omission of the *Brady* claim from his state habeas petition is as irrelevant as it is disingenuous.[14]

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[14] Indeed, the Commonwealth's analysis fails on its own terms. If petitioner had been granted a hearing and discovery on the very ineffective assistance claim to which the misrepresentation was directed (which was predicated on trial counsel's failure to file a *Brady* motion), the Stoltzfus documents likely would have surfaced. Petitioner then could have moved to amend his state habeas petition to add a *Brady* claim.

2. Equally untenable is the Commonwealth's claim that petitioner was duty-bound to disbelieve the Commonwealth's consistent assurances, and continue "diligently" to investigate whether the Commonwealth might, after all, be lying. The Commonwealth has not explained, nor is it apparent, why petitioner could not reasonably rely on the well settled presumption "that public officials have 'properly discharged their official duties.'" *Bracy v. Gramley*, 520 U.S. 899, 909 (1997) (citations omitted). As this Court recently noted, that presumption is dispelled only when there is "clear evidence to the contrary." *United States v. Armstrong*, 517 U.S. 456, 465 (1996). That standard is scarcely met by the Commonwealth's view that petitioner's suspicions should have been aroused by a close reading of a newspaper's "letter to the editor"—which petitioner *never* saw before the federal proceedings—in which Stoltzfus credited Claytor for her "coherent" trial testimony. Va. Br. 23 (citing J.A. 250).

Indeed, while the Commonwealth seems to believe that petitioner should be charged with actual knowledge of every conceivably relevant fact in the public record—including every inch of the daily newspapers—its view in that regard is clearly foreclosed by *Amadeo v. Zant*, 486 U.S. 214 (1987). In *Amadeo*, the key document that alerted the defendant to his claim was found by sheer happenstance in public court records, where it evidently had rested since its creation. That fact, of course, did not keep this Court from endorsing the district court's view that the document "was concealed by county officials and therefore was not *reasonably* available to petitioner's lawyers." *Id.* at 223 (emphasis added). There is no reason for a different rule of law here, where there is no basis for disputing petitioner's claim that he reasonably relied on the Commonwealth's misleading representations.[15]

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[15] *McCleskey v. Zant*, 499 U.S. 467 (1991), on which the Commonwealth extensively relies (Va. Br. 20-22), is completely inapposite here. As the Commonwealth itself recognizes, the defend-

3. Finally, while the Commonwealth concedes that petitioner had no entitlement to any discovery in state habeas (Va. Br. 24), it asserts that the same facts that alerted petitioner to the need for *Brady* discovery in federal court should have caused him to seek the same relief earlier, and to assert his *Brady* claim, in the state habeas proceedings. *Id.* at 26. That argument fails because petitioner never alleged in federal court that he had any "good cause" for inquiring into potential *Brady* violations. Instead, petitioner's counsel sought, and was granted by the district court, an omnibus authorization to examine all public files relating in any manner to petitioner. *See* Record, Sealed Pleading No. 20 (Feb. 12, 1996). While petitioner quite likely received discovery for which he was not legally eligible, that merely confirms that, like the defendant in *Amadeo*, he discovered the basis for his federal claim by sheer fortuity.

CONCLUSION

For the foregoing reasons and those stated in petitioner's opening brief, the judgment of the court of appeals should be reversed.

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ant in *McCleskey* actually *raised* his federal claim in state habeas, dropped the claim in his first federal habeas petition, and then attempted to resurrect it in a successive federal petition. *Id.* at 20-21. Those facts left no doubt that the defendant had clearly been aware of his claim all along.

Respectfully submitted,

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